UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

DEBORA A. TELLEZ, Case No. 09-4461-PMG

Debtor.
_____/

EVERETTE WEAVER,

Plaintiff,

v.

DEBORA A. TELLEZ,

Adversary No. 09-352-PMG

Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DISCHARGEABILITY UNDER § 523(a)(2)(A) AND § 523(a)(4)

This Proceeding came before the Court on the Complaint Objecting to and/or for Determination of Dischargeability of Debt filed by the Plaintiff, Everett Weaver, against the Defendant, Debora A. Tellez. In the Complaint, the Plaintiff seeks a determination that the money owed to him by the Defendant with respect to alleged unpaid rent and damages to his house while the Defendant was a tenant is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(4).

At an evidentiary hearing held on December 17, 2010, the Court conducted a trial and also addressed the Plaintiff's Motion to Compel Discovery (Doc. # 47) and Motion to Determine Sufficiency of Request for Admissions (Doc. # 48).

Procedural Background

On June 2, 2009, the Defendant filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code. The Plaintiff is listed in Defendant's Schedule F as a creditor holding an unsecured non-priority claim for lease expenses in the amount of $4,240.00.

On June 5, 2009, the Notice of Commencement of Case, Section 341 Meeting of Creditors, and Fixing Deadlines was entered. The notice showed the last day to oppose discharge or dischargeability as September 14, 2009.

On July 14, 2009, the § 341 Meeting of Creditors was held and concluded. On July 16, 2009, the Chapter 7 Trustee filed a Report of No Distribution, stating that there was no property available for distribution to creditors.

On July 13, 2009, the Plaintiff, pro se, filed a Complaint with the court objecting to the discharge of the Debtor. On August 5, 2009, the Plaintiff filed an Amended Complaint and Objection to Discharge. The Defendant, also pro se, filed a response to the Amended Complaint. On December 22, 2009, the Court entered an order setting the trial on the Amended Complaint for March 18, 2010.

The Plaintiff states that the basis for his action is that "Bankruptcy code section 523 states that a creditor can contest the dischargeability of a particular debt that was incurred through false pretenses, fraud, use of false financial statements, embezzlement or larceny," and that "plaintiff is challenging the dischargeability of debt through false pretenses and fraud." (Doc. 26 p. 1).

On March 18, 2010, the Plaintiff failed to appear at the trial. As a result of the Plaintiff's failure to attend the trial, the Court entered Final Judgment in favor of the Defendant.

On April 6, 2010, the Plaintiff filed a Motion for Reconsideration of the judgment. After a hearing on May 11, 2010, the Court conditionally granted the Motion for Reconsideration.

The Plaintiff complied with the conditions for reconsideration, and on July 7, 2010, Plaintiff filed a Motion for Leave to Amend Plaintiff's First Amended Complaint and Demand for a Jury Trial (the Motion to Amend) and on September 9, 2010 the Court entered an order denying the Motion to Amend.

On September 9, 2010, the Court also entered an Order Setting Aside the Final Judgment that was entered on March 29, 2010 in favor of the Defendant.

On September 17, 2010, the Court sent a Notice of Hearing to the parties that rescheduled the Final Evidentiary Hearing on the Complaint to December 17, 2010.

On November 19, 2010, the Plaintiff filed a Motion to Compel Discovery and Motion to Determine Sufficiency of Request for Admissions.

The Plaintiff alleges in his trial memorandum that he is "challenging the dischargeability of debt through false pretenses and fraud because the defendant knowingly lived beyond her means after filing for bankruptcy on November 16, 1993, promised to pay the rent and had no intention to pay, abandoned plaintiff's property after deliberately damaging it…" (Pl.'s Trial Memorandum Doc. 51, p. 2).

At the beginning of the December 17, 2010, hearing, the Court addressed the Plaintiff's Motion to Compel Discovery and Motion to Determine Sufficiency of Request for Admissions. The Court stated that it could deal with the discovery issues if the parties wanted to delay the trial again. (Tr. pp. 6-7). The Plaintiff chose for the trial to continue as scheduled. (Tr. p. 7).

Findings of Fact

In March of 2007, the Plaintiff entered into a one year lease to rent a house at 10080 SW 45th Avenue, Ocala, FL 34476, to the Defendant's partner, Todd Wilson. (Def.'s Ex. 1). The term of the lease commenced in April of 2007. (Def.'s Ex. 1). Although the Defendant was not a party to the lease, she lived in the house with her children and made rental payments to the Plaintiff. The rent during the first year was $1,500.00 a month. After the first year, the rent was lowered to $1,350.00 a month, and the Defendant became a month to month tenant. Although the rental payments were sometimes late, the Defendant testified that the only time she did not pay the rent was in January of 2009 because she was informed the Plaintiff's mortgage on the house was being foreclosed. (Tr. p. 17, 49).

In addition to the unpaid rent, the Plaintiff alleges that the Defendant was not truthful about various repair issues while she was living in the house, and that she failed to leave the house in good condition. The Plaintiff also alleges that she did not give him thirty-day notice that she was moving out, and did not vacate the house until March of 2009. In total, the Plaintiff alleges he is owed $13,026.00 for unpaid rent and damages. In support, he attached an itemized Summary of Liability, with invoices, to his Trial Memorandum. (Doc. #51 with attached exs. a, c, and d).

Summary of Liability

Rent owed from January 1, 2009, to April 30, 2009 -	$5,400.00
Estimate of repairs for damage to property -	$4,000.00
Salvage Value for destruction of dryer[1] -	$435.05
Cost to drain, Scrub and refill swimming pool -	$400.00
Invoice for A and N leasing to pump out Septic Tank -	$185.00
Court filing fee -	$250.00
Total Liability -	$10,670.05
March 2009 to December 2010 at 12%	$2,355.95
Total Liability owed by Defendant	**$13,026.00**

With respect to the Plaintiff's allegation that the Defendant left the house in poor condition, both parties presented photographs of the house. Although the Plaintiff's photographs show what appear to be significant damage and mold, the photographs were taken approximately one year after the Defendant moved out. (Pl.'s Exs. A-O)(Tr. p. 33). The Defendant's photographs, dated March 9, 2009, were taken shortly after the Defendant moved out of the house and do not show any evidence of damage or mold.[2] (Def.'s Ex. 20).

The parties each presented affidavits that address the condition of the house at the time the Defendant moved out. The Plaintiff presented an affidavit signed by Rebecca Ramos, the person responsible for collecting the monthly rental payments. The affidavit of Ms. Ramos states that Ms. Ramos received a message from the Defendant in March of 2009 that Defendant had moved out of the house and had left the keys on the kitchen counter. (Doc. 51, ex. e). With respect to the condition of the house when vacated, Ms. Ramos states in the affidavit that "[w]hen I visited the property I discovered that the property was left unsecured, the dryer was placed in the garage, the stove was not cleaned and the house was left in a mess." (Doc. 51, ex. e).

Contrary to the affidavit of Rebecca Ramos, the Defendant presented an affidavit and statement in support of her assertion that she left the Plaintiff's house in good condition. In the affidavit, Defendant's former neighbor, Leslie Hughes, states that he was present in the house on February 28, 2009, when the Defendant moved out, and that he saw the keys to the premises were left on the kitchen counter. (Def.'s Ex. 7). He also states that in his opinion as a licensed realtor the house was left in "good move in condition" and the "pool was clean and in working order." (Def.'s Ex. 7). The statement by Scott and Cari Lamperski states that they were present in the

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[1] The Plaintiff is actually seeking the salvage value for the alleged destruction of his washing machine, not the dryer.
[2] The Defendant testified that although she moved out of the home on February 28, 2009, she went back to take the photographs because she felt threatened by the Plaintiff and wanted to document that she left the home in good condition. (Tr. p. 70).

house on February 28, 2009, that the house was left in good condition, and that the Defendant left the house keys for the owner on the kitchen counter when she vacated the house on February 28, 2009. (Def's Ex. 7A).

In response to the Plaintiff's allegation that she broke his washing machine, the Defendant testified that approximately two months after she moved into the house the washing machine stopped working, and that although she informed the Plaintiff of the problem she never received a response. (Tr. p. 10). The Defendant testified that she paid for a service call, and based on the repairman's estimate of the cost to repair she purchased a new washing machine and moved the broken machine into the garage. (Tr. pp. 11, 59-60)(Def.'s Ex. 13).

The Defendant also disputes the allegation that she was not truthful with respect to house repairs that were needed while she was a tenant. Specifically, the Plaintiff questioned repairs that the Defendant made to the air conditioning and septic tank. In support of the fact that the air conditioning needed to be repaired, the Defendant presented the receipt from the service call. (Def.'s Ex. 11). With respect to the allegation that she conspired with the septic tank service man to charge the Plaintiff for unnecessary services, the Defendant testified that she did not know the service man and did not conspire with him to charge the Plaintiff for unnecessary services. (Tr. p. 87).

With respect to the allegations concerning mold, the Defendant testified that in March of 2008 she notified the Plaintiff via email of mold damage that was found underneath the carpet in the dining room. (Tr. pp. 45-46) (Def.'s Ex. 10). The Plaintiff responded to the email by saying that he would fix the problem by having gutters installed in the front of the house, however, gutters were never installed. (Tr. p. 47). Michael Nappi, the Defendant's father, who worked as an environmental project director in the Environmental Protection Agency for almost eighteen

years, credibly testified on the Defendant's behalf with respect to the Plaintiff's allegations concerning mold. (Tr. p. 56-57). Mr. Nappi testified in detail how mold is spread by spores, and how the spores can easily be spread through HVAC's, and air-conditioning, thus explaining how the mold in Plaintiff's house could spread from one area in the house to another. (Tr. pp. 79-85).

In response to the Plaintiff's allegation that she failed to give the thirty-day notice, the Defendant produced an email she sent to the Plaintiff on January 26, 2009 that addressed her intent to move. The email stated, "It is my understanding that the rent we have been paying on this house has not been going toward the mortgage. I have been informed that your home is in the foreclosure process. Therefore my family is looking for a new home." (Def.'s Ex. 5).

The Defendant also disputes the Plaintiff's allegation that she abandoned the property. The Defendant testified that she notified Rebecca Ramos, the person responsible for collecting the rent, to advise that the keys were on the counter, and that she also left a voicemail with the Plaintiff. (Tr. p. 9)(Def.'s Ex. 9). Additionally, the Defendant presented an email she received from the Plaintiff on March 6, 2009, in which the Plaintiff acknowledged that the Defendant had advised him of her intention to move out of his home at the end of February. (Def.'s Ex. 6).

Discussion

The Plaintiff asserts that the alleged debt owed to him by the Defendant is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(4).

A. A Plaintiff's burden under 11 U.S.C. § 523

A creditor objecting to the dischargeability of a debt carries the burden of proof, and the standard of proof is preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); Alta One Federal Credit Union v. Bumgarner, 402 B.R. 374, 379 (M.D. Fla. 2007)("Pursuant to the *Grogan* decision, the objecting party must establish each

of the four elements of fraud by a preponderance of the evidence."); In re Wiggins, 250 B.R. 131, 134 (Bankr. M.D. Fla. 2000); Fed. R. Bankr. P. 4005 (2007).

Exceptions to discharge "should be strictly construed against the creditor and liberally in favor of the debtor." Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986).

B. Non-Dischargeablity under 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) provides that a discharge under § 727 does not discharge an individual debtor from a debt for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud...." 11 U.S.C. § 523(a)(2)(A).

In order to prevail under § 523(a)(2)(A), a plaintiff must prove (1) that the debtor made a false representation with the purpose and intent of deceiving the plaintiff; (2) that the plaintiff justifiably relied on the representation; and (3) that the plaintiff sustained a loss as a result of the representation. In re Pupello, 281 B.R. 763, 766 (Bankr. M.D. Fla. 2002). See also In re Parr, 347 B.R. 561, 564 (Bankr. N.D. Tex. 2006).

As stated above, exceptions to discharge "should be strictly construed against the creditor and liberally in favor of the debtor." Hunter, 780 F.2d at 1579.

The Plaintiff alleges that the Defendant did not tell him the truth with respect to various repair issues while she was living in the house. He also alleges that she failed to leave the house in good condition, did not give him the thirty-day intent to move notice, did not vacate the house until March of 2009, and owes him unpaid rent. In total, the Plaintiff alleges he is owed $13,026.00 for unpaid rent and damages.

Upon review of the evidence and testimony, the Court does not find that the Defendant made false representations to the Plaintiff with the intent of deceiving him. The Defendant's

email to the Plaintiff on January 26, 2009, supports her assertion that she notified him of her intent to move. (Def.'s Ex. 5). The Defendant's photographs of the house from March 9, 2009, reflect that the house was left in good condition when she moved out.[3] (Def.'s Exs. 5, 20). The Defendant's photographs of the house also support the affidavit of Leslie Hughes, and the signed statement by Scott and Cari Lamperski, that the Defendant left the house in good condition when she moved out on February 28, 2009. Additionally, the documentation regarding the service calls for the washing machine and the air conditioner support the Defendant's assertion that she was truthful with the Plaintiff that those repairs were needed. With respect to the recommended repairs to the septic tank, the Defendant testified that she did not know the individual who made the service call and that there was no conspiracy to defraud the Plaintiff. The Defendant's testimony was credible and there is no evidence in the record to support a finding that the Defendant engaged in any form of conspiracy.

With respect to the rental income that the Plaintiff alleges he is owed, the Defendant's January 26, 2009, email to the Plaintiff reflects that the Defendant did give the Plaintiff notification of her intent to move. (Def.'s Ex. 5). Further, even if the Defendant's email did not constitute proper notification that she was moving out, the Court does not find that the email was a false representation with the intent to deceive. The Defendant also candidly explained that she did not pay the January, 2009 rent because she had learned the house was in foreclosure and she needed the money for moving expenses.

Having conducted a lengthy trial during which both parties gave extensive testimony, the Court understands that the Plaintiff's rental of his house to the Defendant did not work out as either party anticipated and that numerous disputes and issues arose during the term of the

[3] The Court has considered the Plaintiff's photographs that reflect evidence of mold damage to the house. However, these photographs were taken approximately one year after the Defendant moved out.

Defendant's occupancy. However, the evidence does not support a finding that the Defendant made false representations to the Plaintiff with the intent of deceiving him.

Accordingly, the debt from the Defendant to the Plaintiff is not excepted from discharge pursuant to § 523(a)(2)(A).

C. Non-Dischargeability under § 523(a)(4)

Section 523(a)(4) provides that a discharge under § 727 does not discharge an individual debtor from a debt for "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(2)(A).

For a debt to be nondischargeable under the "fraud or defalcation" clause of § 523(a)(4), it is well-established that the debtor must have violated a fiduciary duty under an express or technical trust. Federal law determines the existence of a fiduciary capacity under 11 U.S.C. § 523(a)(4). In re Esfahani, 2010 WL 3959607, *2 (Bankr. M.D. Fla. Sept. 22, 2010). Federal law narrowly defines the concept of a "fiduciary relationship" under § 523(a)(4) to include only relationships involving an express or technical trust. Quaif v. Johnson, 4 F.3d 950, 953 (11th Cir. 1993); In re Regan, 477 F.3d 1209, 1211 (10th Cir. 2007). Under applicable federal principles, an express or technical trust must be present for a fiduciary relationship to exist under 11 U.S.C. § 523(a)(4). In re Guerrero, 2010 WL 2926534, at 2 (Bankr. S.D. Fla.).

In other words, "to qualify under 11 U.S.C. § 523(a)(4), there must be an express or technical trust imposing trustee-like obligations upon Defendant." In re Guerrero, 2010 WL 2926534, at 2 (Bankr. S.D. Fla.).

In this case, the Plaintiff asserts that the alleged debt is not dischargeable under § 523(a)(4) because the Defendant took the rent money that she owed him and used it for her own use. The Plaintiff has not alleged, however, that the Debtor violated any duties under an express

or technical trust. Federal bankruptcy law governs whether a fiduciary relationship exists in a § 523(a)(4) nondischargeability action. In re Magpusao, 265 B.R. 492, 497 (Bankr. M.D. Fla. 2001). An extraordinary level of fiduciary duty must be present for a debt to be nondischargeable pursuant to § 523(a)(4). Bar-Am v. Grosman, (In re Grosman), No. 6:05-ap-328-KSJ, 2007 WL 1526701, at 15-16 (Bankr. M.D. Fla. May 22, 2007)(recognizing that even the statutory fiduciary duties of loyalty and care a managing member owes to a limited liability company and its members pursuant to Fla. Stat. § 608.4225(1) does not meet the level of fiduciary duty required for § 523(a)(4) purposes).

Thus, for a debt to be nondischargeable under the fraud or defalcation clause of § 523(a)(4), the debtor must have violated a fiduciary duty under an express or technical trust. In this case, an express or technical trust was not created under either state law or by agreement of the parties. Accordingly, the debt is not excepted from the discharge under the "fraud or defalcation clause" clause of § 523(a)(4).

"In contrast to fraud and defalcation, embezzlement and larceny need not occur within a fiduciary capacity in order to be nondischargeable under § 523(a)(4)." In re Martinez, 410 B.R. 847, 852 (Bankr. W.D. Mo. 2008). Typically, embezzlement is defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." In re Lorenzo, 2010 WL 2899053 at 10 (Bankr. M.D. Fla.)(quoting In re Kelley, 84 B.R. 225, 231 (Bankr. M.D. Fla. 1988). To prevail under the larceny exception of § 523(a)(4), a plaintiff must prove that the debt arose from "the fraudulent taking and carrying away of property of another with intent to convert such property to his use without the consent of another." In re Pupello, 281 B.R. at 768. Fraudulent intent is an element of both causes of action. In re Lorenzo, 2010 WL 2899053 at 10-11.

The circumstances in this proceeding do not reflect that the Defendant has engaged in the fraudulent appropriation of property or the fraudulent taking and carrying away of property from the Plaintiff. No personal property was removed from the Plaintiff's house.[4] Further, the Defendant testified that she used the funds that she would have used for the January 2009 rent to cover her moving expenses because she needed to secure a new home for her family as soon as possible since the rented house was in foreclosure. (Tr. pp. 17, 49). The Defendant's testimony was candid and credible. The Court does not find that she acted with fraudulent intent. Accordingly, the debt from the Defendant to the Plaintiff is not excepted from the discharge under the embezzlement and larceny exception of § 523(a)(4).

Conclusion

As set forth above, exceptions to discharge "should be strictly construed against the creditor and liberally in favor of the debtor." Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986). The Court understands that various issues arose between the parties during the Defendant's tenancy, and that the Defendant owed at least one month's rent to the Plaintiff as of the filing date of the petition. The evidence, however, does not support a finding that the Defendant made false representations to the Plaintiff with the intent of deceiving him or that the debt arose from "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Accordingly, the Plaintiff is not entitled to have the debt declared nondischargeable under either 11 U.S.C. § 523(a)(2)(A) or § 523 (a)(4).

[4] The evidence reflects that the washing machine the Defendant took with her was the one she purchased after the Plaintiff's machine would not work.

Consistent with these Findings of Fact and Conclusions of Law, a separate judgment will be entered by the Court.

Dated this 30 day of March, 2011, in Jacksonville, Florida.

BY THE COURT

Paul M. Glenn

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Paul M. Glenn
Chief United States Bankruptcy Judge